IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 220

WALTER FORD GORMLY,
Petitioner-Appellant.

vs.

UNITED STATES,
Respondent-Appellee.

PETITION FOR REHEARING

To the Supreme Court of the United States:

Comes now Walter Ford Gormly, petitioner-appellant in the above entitled cause, by his attorney, and presents this his petition for a rehearing on the order of the Court denying his petition for writ of certiorari, and in support thereof respectfully shows:

1. That the judgment below, sought to be reversed, is based upon an order of an administrative tribunal which petitioner claims to be invalid because:

a. Issued for the purpose of incarcerating defendant in a penal institution known as a Civilian Public Service Camp, and subjecting him to involuntary servitude without compensation, and not as a punishment for crime;

b. The Selective Training and Service Act of 1940 does not expressly, or by implication, authorize the regulations which have been issued providing for such incarceration and involuntary servitude;

c. The regulations issued under said Selective Training and Service Act of 1940 do not contain any provisions authorizing the Director of Selective Service or the Local Administrative Board in question to issue the order upon which this criminal proceeding is based, or any similar order;

d. The Local Board did not authorize or issue the order.

2. The trial court committed error in refusing to receive testimony demonstrating that the order in question is invalid because imposing involuntary servitude, contrary to the Fifth Amendment and Thirteenth Amendment to the Constitution of the United States, and in failing to take judicial notice that Civilian Public Service Camps are penal institutions, and that persons assigned there, including defendant, are subjected to involuntary servitude not as punishment for crime, and in failing to apply the fundamental law of the land with respect to the several points listed at paragraph 1 above. The cases decided in *Arver vs. U. S.*, 245 U. S. 366, did not involve any question with respect to the incarceration of conscientious objectors for the purpose of forced labor without compensation.

3. This Court, prior to denying petitioner a writ of certiorari, granted a writ in the case of *Nick Falbo vs. United States of America*, (3 Cir., 135 F. (2) 464), October Term, 1943, No. 73, wherein the questions at issue in this case are also at issue, and where, as in petitioner's case, the issue was and is as to whether the invalidity of the Local Board's induction order can be urged as a defense to the indictment for failure of the defendant as a civilian to obey the order of such administrative tribunal.

4. At the same time that petitioner's petition for writ of certiorari was denied this Court granted a petition for writ of certiorari in the case of *Billings vs. Truesdell*, (C. A. A. 10, 135 F. (2) 505), October Term, 1943, United States Supreme Court, involving, as petitioner believes, the question as to whether the invalidity of an order of a Local Draft Board is ground for releasing him from military service and jurisdiction of the military authorities.

5. The brief of petitioner recited a number of instances wherein the decision of the Circuit Court of Appeals was inconsistent with decisions of other Circuits and with general law.

6. That justice requires that this petitioner have an equal opportunity to be heard in this Court on the grounds common in his case with those in the cases of *Nick Falbo* and *Arthur Goodwyn Billings*, mentioned above.

WHEREFORE, it is respectfully urged that this peti-

tion for a rehearing be granted and that the petition for a writ of certiorari, heretofore denied, be granted.

Dated at Milwaukee, Wisconsin, this 22nd day of October, 1943.

Respectfully submitted,

PERRY J. STEARNS,

Counsel for Petitioner.

I, counsel for the above named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PERRY J. STEARNS,

Counsel for Petitioner.

BRIEF SUPPORTING MOTION FOR REHEARING

To the Supreme Court of the United States:

Comes now Walter Ford Gormly, petitioner in the above entitled cause, and presents this his brief in support of his petition for a rehearing on his petition for certiorari and the order denying said petition. Petitioner respectfully shows:

1. The questions raised in petitioner's brief in support of petition for writ of certiorari affect the freedom and liberties of thousands of men sincerely and conscientiously opposed to war as an implement for the adjudication of international disputes, and to personal service in the use of such instrument.

2. The regulations issued under the Selective Training and Service Act of 1940 depart from the Act, and require every conscientious objector to war to go to Civilian Public Service Camps and to sacrifice his freedom and his earnings for the duration of the war, or go to jail, contrary to the expressed intent of Congress that such conscientious objector shall, in lieu of induction, be assigned to work of national importance under civilian direction.

3. The Solicitor General in his brief indulges (vacuum in vacuo) in assertions which state and restate the Government's position, but do not answer or meet the arguments and citations of petitioner demonstrating that petitioner has been sentenced to jail for refusing to be subjected to involuntary servitude, sought by the Selective Service System to be forced upon him contrary to the 5th and

13th amendments to the United States Constitution and contrary to said Act of 1940.

The brief on this motion is confined substantially to the point of involuntary servitude, without, however, abandoning other points or conceding the validity of the argument of the Solicitor General with respect to such other points. References to petitioner's brief and to the brief in opposition are indicated by the letters "G" and "S" respectively.

INVOCATION OF DIVINE WISDOM

At the outset petitioner offers his prayer to Diety. He speaks not for himself alone but for thousands similarly situated. He speaks not for conscientious objectors alone but for all who labor. He speaks not for this day alone but for future ages. He prays that his petition may so express the truth that moves him as to penetrate that inertia which threatens to thwart the principles of freedom and justice for which only he makes his sacrifice. May the film of prejudice by which this and a companion case was enveloped below by unjust charges of ingenuity, triviality, frivolity, contumacy, sabotage and self-exaltation be pierced at length by American fair play. He prays that the spirit which moved Congress to recognize the validity of the position of the conscientious objector may be shared by the officers and courts charged with the interpretation and administration of that law. He prays that the same principles of law and justice which have developed through the years for the construction of statutes generally and the protection of persons charged with crime generally may obtain in cases arising under the Selective Training and Service Act of 1940, uninfluenced by war hysteria or political considerations. He prays that the principles of freedom and equality may prevail against the advocates of the use of force. May his efforts be inspired by Thee and work to advance the hour of emancipation of those who suffer for conscience sake at the hands of the enforcers of conformity, whether they are in jail as convicts under an unjust regime after a trial in form, or in camp as assignees of a crafty system of imprisonment without benefit of trial or authority of law. May the voice of Almighty God speak through the members of this Court to end all such oppression throughout the land.

BRIEF

I. PETITIONER'S CASE IS EQUALLY AS IMPORTANT AS CASES IN WHICH WRITS HAVE JUST BEEN GRANTED.

Counsel for petitioner is informed that this Court recently has granted writs of certiorari in *Nick Falbo vs. United States,* (135 F. (2) 464, C. C. A. 3), No. 73, October Term, 1943, and *Billings vs. Truesdell,* decided by C. C. A. 10, its No. 2661, April 30, 1943, (135 F. (2) 505).

The Falbo case.

Counsel for Nick Falbo have favored us with a copy of their brief, and references to the Falbo brief are designated by the letter "F".

At argument 1 (F. 23) counsel argue that petitioner has the right to urge as a defense the invalidity of the induction order. Counsel state (F. 14) that petitioner Falbo does not ask for that which is not allowed by law, and (F. 11) recites that complete exemption is granted ministers of religion, except as to registration. Counsel state, as a virtue (F. 12) "Neither petitioner * * * nor Jehovah's Witnesses consider the Selective Training and Service Act as unconstitutional."

Present petitioner has indicated (G. 29) that he, no more than Nick Falbo, is not required to show that the Selective Training and Service Act is unconstitutional Petitioner claims that the regulations have injected into the Conscription Act a provision not found in the Act of 1917 and not authorized by the Act of 1940, and that such new feature is unconstitutional as well as illegal. Accordingly petitioner's prayer cannot be dismissed on the authority of the Arver cases. A new Act and new regulations are here presented as the Solicitor General concedes, saying, "This experience of the first world war showed the propriety of making a *different provision* * * *" (S. 10) (emphasis ours).

Counsel (F. 14) properly points out that the defendant, Nick Falbo, by making a test case is not defying or flouting the law. Petitioner Gormly was prejudicially charged, directly or by insinuation, with flouting the law (R. 84) when the District Attorney stated to the jury:

> "The Defendant himself, though, sets himself up above that law. * * * He is sufficient unto himself.

> No matter what the other millions of people in the country might say or feel, he is going to determine for himself whether or not he should obey this law."

For petitioner to defend himself in criminal court on the ground of the invalidity of a regulation not conforming to the Act is as absolute a defense as defending on the ground of a misclassification based on the ministerial exemption. The *constitutional* provision against involuntary servitude is as absolute, if not more so, than the *legislative* exemption granted ministers.

As counsel (F. 23) point out, the accused, upon the trial of a criminal charge may urge, without limitation, any and all defenses that are available. This fundamental right was denied petitioner Gormly and the attempted exercise thereof was the subject of caustic comment in the opinions of the appeal court below.

Yet, the Circuit Court of Appeals, as shown by the record, did not express a judicial opinion on most of the defenses raised by the petitioner, but (R. 96) dismissed them, some as having been sufficiently treated in the case of *U. S. vs. Mroz*, 136 F. (2) 221, and (R. 99) others with the remark:

> "Various other contentions made by counsel for defendant, have been considered and are all rejected. We refer to only one to illustrate how devoid of merit they are."

The appellate court takes a final thrust at counsel's industry in presenting all defendant's available defenses without limitation by stating (R. 100):

> "A Court is not required to take under advisement every motion made by ingenius counsel."

The appeal court then figuratively speaking leaves the bench, intimates its abhorrence of the person who will not fight, and reveals its opinion that defendant is attempting to flout the law, saying (R. 100):

> "Unfortunately, defendant is not the only one of the group which is determined not to take up arms in their country's defense. Much time is taken in an effort to make clear the issue which confronts the citizen who refuses to obey the command of his Government. Perhaps it is wasted time."

It is a deplorable situation which can only be righted by this Court when an august appellate tribunal in this country considers that it is wasting time in considering

defenses presented and argued in good faith and on fundamentally sound authority.

The question raised by petitioner in defense that he is not bound to accept an assignment to take such work as the Director of Selective Service may parcel out to him is in the nature of an absolute defense based upon constitutional principles and rules of natural law. It is as absolute in the constitutional sense as Mr. Falbo's claim of being a minister is an absolute defense under the legislation in question. While this Court is not asked in this case to consider the constitutionality of the Selective Training and Service Act of 1940 as a whole, it is bound to review, and at no distant future date, the constitutionality of the regulation claimed to be issued pursuant to that law under which the right is here asserted to assign innocent men to civilian activities in a penal camp against their will whether with or, as here, without pay. It is just as absolute a defense in the legislative as well as in the constitutional sense that the order claimed to be issued was in fact not issued (G. 40-45), and also that the law and the regulations do not in terms authorize the issuance of any such order (G. 32, 33, 35, 36), as is the legislative defense of ministry (Sec. 5 d, 50 U. S. C. App. 305) in the *Falbo case.*

Petitioner's brief (G. 40-45) demonstrates that the Act and regulations contain no express authority to the Director of Selective Service or to Local Boards to issue orders directing civilians when and where they must report for work of national importance, or requiring them to accept any such assignment. The Solicitor General has shown none. He apparently rests on the opinion below (R. 97) which quotes the Regulation to the effect that when Form 50 is mailed to a registrant, *"it shall be his duty to comply."* This answer is inadequate. It does not answer petitioner's charge that neither law nor Regulations provide that the local board or any other agency may order an American citizen to leave his home and report for work at some distant place in a concentration camp at forced hard labor without pay. This court in the Bowles Case (318-319 U. S.; 63 S. C. 758, 912, 1323) took judicial notice of a fact not part of the record. *A fortiori*, the court will take judicial notice of the Regulations, showing the methods of assignment to Civilian Public Service Camps, the restrictions therein, the lack of compensation and, blessed irony, the requirement that those whose earnings

are confiscated by a benevolent government shall nevertheless provide their own board and keep. Congress surely meant by "assigned to work" to include the ancient principle, "The workman is worthy of his meat." Matthew 10:10, as to those accepting such an assignment.

Counsel (F. 39-44) argue that the availability of the writ of habeas corpus as a remedy does not limit the defenses available in criminal cases. With this we are in accord. The Third Circuit in *U. S. vs. Grieme,* 128 F. (2) 811, 815, suggested that the writ of habeas corpus was the proper remedy and that the invalidity of the order was not a defense. It will be observed that the court below in both the *Mroz and Gormly cases* (136 F (2) 221, 227) does not suggest the writ of habeas corpus as the proper remedy. The Seventh Circuit sweeps out all defenses as trivial and does not even hold out the hope of such remedy of habeas corpus.

Petitioner agrees with counsel (F. 49-53) that the order of the Local Board is a final order in that it attempts to make a final disposition of petitioner's rights. Since this issue will be argued in the *Falbo case,* the Court should be interested in argument that nothing contained in Act of 1940 or regulations thereunder authorizes the Local Board to issue such an order. If certiorari is denied petitioner the issues with respect to the power of the local board to make this order will not be presented to the court. The court in the *Falbo* and *Billings* cases may be engaged in a futile consideration of the effect of an order when such order is invalid *ab initio* and without legal basis.

Counsel (F. 54-58) argue in effect that to fail to permit the defense of the invalidity of the order of the board to be raised the courts become mere factotums for the boards, and thus surrender their judicial duties. Petitioner is thus denied his right of trial by jury. In substance, it is the argument of petitioner (G. 32-34) that the order to report for induction to a Civilian Public Service camp for incarceration is a judicial order and its exercise by a board an unconstitutional delegation of judicial power. Petitioner *Gormly* should have an equal right with petitioner *Falbo* to be heard with respect to this point.

Counsel argue (F. 64-66) that the reason for judicial review is as strong with respect to administrative boards created under the Selective Service Law as with other administrative bodies. This is true. It was in disregard of

this principle that the trial court instructed the jury (T. 37) that the defendant was

> "ordered assigned to such a camp and ordered to report for service at such a Public Service Camp.
>
> "Now, if you believe from all the evidence, and beyond a reasonable doubt, that this defendant was duly classified by his Draft Board in Class IV-E, and that thereafter a valid order to report for induction was given to the defendant and that he wilfully and knowingly failed or neglected to comply with such order, as charged in the indictment, then you may find the defendant guilty. * * *
>
> "Neither this Court nor the jury can review the actions of the Selective Service Boards. Those actions are final. They determine them. In this case the Selective Service Board considered what this applicant said with reference to his conscientious objections. He was classified as a conscientious objector, placed in Class IV-E, and no appeal from that classification was taken.
>
> "Therefore, there are two questions presented to the jury: First of all, was the defendant ordered to appear? Did he receive such an order?, and secondly, did he fail to report?"

Thus the question of the sacrosanct position of the order of the local board is the same in both the *Gormly* and *Falbo* cases.

The court failed to give the instruction requested (T. 30 (4)) with respect to the necessity that an order of a Local Board be made or issued at a regular meeting of the Board. The record shows that the order in question was not made or issued at any meeting of the board or as a result of a vote of the board. The Regulations show that this is regular practice. This raises a question with respect to the validity of all orders of the Boards which is as of as great public import as the questions bearing upon the validity of the order in the *Falbo case*. It is not the usual custom of this Court when devoting its attention to great public questions to do it by halves.

Billings case.

In *Billings vs. Truesdell*, C. C. A. 10, 135 F. (2) 505, 506, (certiorari granted), petitioner predicated his prayer for writ of habeas corpus on the ground that he had not

been inducted into the Army and therefore the military authorities had no jurisdiction over him.

The appeal court cites Sec. 11 of the Act, 50 U. S. C. A. App., Sec. 311, making it a criminal offense for any person knowingly to fail or neglect to perform any duty required of him under the Act, and providing that no person shall be tried by any court martial unless such person has been actually inducted for training and service under the Act. The Gormly case involves this same section 11. The court summarizes the regulations giving, step by step, conscription procedure from the order to report to the act of induction, and the War Department regulations with respect to induction and taking the oath.

The decision of the court is embodied in the last paragraph of the opinion before the conclusion (p. 507). It adopts the superficial reasoning and argument advanced by the Solicitor General in his brief in opposition to this petitioner's prayer for a writ of certiorari, saying:

> "The underlying theory of the Act is that the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."

and further:

> "Presumably, the question before this Court in determining the writ of certiorari will be whether induction is a matter of choice with the proposed inductee."

This is the same question involved in the present case. Petitioner *Gormly* declined to choose to be inducted. He did so before being transported to camp instead of after. The same fundamental question is involved in *Mr. Gormly's* case as in *Mr. Billing's* case and they should be presented together. Accordingly, petitioner's motion for rehearing should be granted.

II. BRIEF FOR THE UNITED STATES IN OPPOSITION

Petitioner did not consider it necessary to file a reply to the Solicitor General's brief for the United States in this case because it did not meet the argument of petitioner, nor answer, on their merits, the citations of decisions of this Court contained in petitioner's brief.

Petitioner requested the Court below (T. 31) to instruct the jury that filing the questionnaire, in which the defendant indicated that his proper classification was IV-E, did not constitute a waiver of any constitutional right as an American citizen. The Solicitor General argues (S. 16):

> "Moreover, the Board gave him what he asked, which was to be classified as a conscientious objector (R. 60) * * *."

This argument of waiver, if so intended, is unworthy of the high office of the Solicitor General.

At Series X of his questionnaire (p. 6), the record shows that petitioner stated that he was conscientiously opposed to participation in noncombatant military service, and at (p. 7) he gave his opinion that his classification should be Class IV.

Pursuant to the regulations, by which the same is made a part of the questionnaire introduced as Government's Exhibit 2, the petitioner in the special questionnaire (Form 47) again declared his claim for exemption from any service under the direction of military authorities. The Solicitor General cannot find in these questionnaires or in any other place in the record, an agreement by the petitioner that if he were classified as IV-E he would forego his constitutional privilege of resisting involuntary servitude and incarceration in a Civilian Public Service Camp at labor without compensation. Obviously, if such a waiver were made it would be without consideration, and void and would not prevent a freeborn American citizen setting up his constitutional rights under the Fifth and Thirteenth Amendments to the Constitution.

Petitioner was and is entitled to fair treatment at the hands of the Solicitor General. It was unfair to attempt to prejudice petitioner's case by the statement (S. 3):

> "His conscientious objection to military service is not based on any tenets of the Methodist Church of which he is a member (R. 65, 82), but rather on philosophical readings (R. 64)."

The intimation of the Solicitor General is that defendant was not a conscientious objector because, in his statement to the F. B. I., (to the introduction of which objection was made and exception taken), he said:

> "I have been influenced by reading 'The Power of Non-Violence,' by Richard B. Gregg, and by reading 'War Without Violence,' by Krishmalal Shridharani."

We do not know by what authority the Solicitor General claims to catalogue these books "as philosophical readings," rather than religious.

The United States has argued at all times that the findings of the Local Board shall be final, and the Local Board in this case found the defendant to be a conscientious objector within the meaning of the Act. The Solicitor General evidently considers it expedient to depart from the principle of finality when he thinks it may further his purposes, regardless of injustice to petitioner. There is no evidence in the case that the Local Board ever had the F. B. I. statement before it in making its classification, and presumably the Solicitor General might admit that it is within the realm of possibility that there was other evidence before the board to support its finding that the defendant's conscientious objections to war are based upon religious training and belief.

Let us next consider argument 2 as presented (S. 8-15). It is a characteristic expedient of those who do not wish to meet an argument on its merits, to belittle it, and the Solicitor General adopts the same approach as was adopted by the Appeal Court below. Petitioner declines to be pooh poohed out of Court, and out of his freedom.

The Solicitor General (S. 8) says that compulsory military service, regardless of religious beliefs, does not constitute involuntary servitude, and exemption therefrom is discretionary with Congress. Petitioner has attempted to make it clear to the Solicitor General, without success, that it is unnecessary to the petitioner's case to argue the validity of this point. Accordingly, petitioner has not considered it necessary to determine whether the cases cited by counsel (S. 8, notes 11, 12) support these propositions. The Solicitor General, however, is correct in stating it to be petitioner's position that the grant of power to raise armies is not a grant of power to conscript men for non-military purposes, entirely outside of the armed forces. The mere fact that an army needs supplies does not make those whose labor produces the supplies a part of the army. This is obvious.

The words of the Selective Training and Service Act of 1940, "be assigned to work of national importance," is the first attempt by Congress so far as we know to extend the constitutional power to raise armies to include the "draft of manpower" (as the Solicitor General softly puts it

(S. 11)), for other than military purposes. It is strange the Solicitor General should object to having this novel application of Congressional power subjected to searching review by this court. This court should subject to review such a novel exercise of Congressional power as well as the administrative extension thereof involved in this case.

Counsel argue (S. 9) that the

> "provision for assigning conscientious objectors to work of national importance under civilian direction is a necessary and proper adjunct * * * to the execution of the power to wage war and raise armies, * * *."

This argument is both improper and untrue. Improper, because constitutional prohibitions for safeguarding the liberty of the citizen are not to be obliterated on any ground of expediency. Untrue, because the British Government, which was in the war before we were, has not found the creation of Civilian Public Service camps to be necessary to execution of the power to wage war and raise armies.

In a "Memorandum on the National Service Acts, 1939-41," prepared for the War Resisters International by Charles H. E. Hill, January, 1942, obtainable from H. M. Stationery Office, York House, Kingsway W.C. 2, London, Eng., the author states of National Service Acts of 1939 and 1940, and National Service Acts of 1941 that the conscientious objector in England may be refused exemption or may be exempted from combatant service only, or may be exempted from all military service, with or without conditions. Since the English law permits exemptions without conditions, it is clear that the English have not found it necessary to their power to wage war and raise armies to impose conditions in all cases. In the "Conscientious Objectors and the National Service Acts" published by Central Board for Conscientious Objectors, 6 Endsleigh Street, London, W.C. 1, April, 1942, p. 9, item 13, it is stated:

> "After you have been provisionally registered as a conscientious objector, the Ministry may decide that you are in a reserved occupation; in that event they will send you a circular informing you that you will not be called before a Tribunal until you cease to be reserved or change your job."

and page 10:

> "If you are not 'reserved,' your employer may,

whether you are a man or woman, apply on Form N.S. 300 to have your calling up *deferred* on the ground that it is in the national interest that you should not be moved from your present work."

And at p. 14, item 23:

"IF YOU ARE REGISTERED CONDITIONALLY

"The Tribunal must specify 'work of a civil character under civilian control,' and such work may be either whole-time, paid or unpaid. The Tribunal usually specifies the *nature* of the work, and not a particular firm or employer. The Ministry can direct you to undergo training for the work specified.

"If you are required to do whole-time work different from your ordinary job, you must try to find it yourself. An obvious step is to apply to a Labour Exchange for help."

The court may take judicial notice that in England the Civilian Public Service camp or concentration camp has not been adopted for its own citizens as an instrument of national policy. The concentration camp for self-reliant citizens is a fascist practice, not Anglo-Saxon. Even if it were otherwise the fact remains that the United States unlike England is operating under a written constitution which the Bar is under oath to support. The plea of necessity must give way to the plea of propriety when the Constitution forbids, as it most certainly does with respect to the "drafting of manpower" for civilian purposes.

Untrue also, because the United States long has used its constitutional power to wage war and raise armies, and never until 1940 found it necessary to provide for "assigning" manpower for civilian purposes, or as anticipatory incarceration or punishment for holding religious scruples against war. Untrue also, because an argument of expediency is relative and does not demonstrate necessity.

Counsel (S. 9) cite the Act of 1917, exempting conscientious objectors only from combatant service and the Furlough Law of 1918 permitting conscientious objectors to be furloughed to engage in work under civilian direction. The Solicitor General does not give us the benefit of his research to show how this alleged work under civilian direction was conducted. He should have informed the Court whether such work under civilian direction was conducted in a concentration camp, and whether the conscientious objector

so furloughed was deprived of the benefits of his liberty, and required to pay his own board while his earnings were confiscated. If not, his argument falls short and the Act of 1918 is to be distinguished.

The Solicitor General is correct in saying that the presence of conscientious objectors in the army presented a serious problem of discipline and morale (S. 9). There may be an equal problem of unity and morale if the Government persists in a policy of subjecting free citizens to incarceration, not as punishment for crime, and without compensation, thrown on charity. But, petitioner is not concerned with arguments of expediency since his position is based upon the fundamental natural rights of a free man guaranteed by the Fifth and Thirteenth Amendments to the Constitution of the United States, and which this Court is duty bound to uphold when a citizen seeks protection.

The Solicitor General says (S. 10) the experience of the first world war showed the propriety of making a different provision for conscientious objectors. Equality was the theory on which universal conscription was based (S. 23). He concedes that conscription of conscientious objectors presented a considerable problem to the Army (S. 9) showing the propriety of a different provision (S. 10). He seems to think that the correct solution has now been found (S. 10). These arguments of the Solicitor General are political and should be addressed to the Legislature. They should not be addressed to this Court in determining questions of right and law and justice. He hurdles so far and high as to lose contact with earth when he says (S. 10, 11) the sec. 5g (S. 24 top) means "assignment to work analogous to noncombatant service in the armed forces." Neither the Act nor this record supports this bald assertion.

Petitioner's brief on his petition for writ of certiorari was based on decisions of this court which have not been overruled and which the Solicitor General does not answer in his brief, except by arguments based on policy and expediency (S. 8-15), not addressed to the principles of law involved in said cases.

Counsel cites the preamble at Sec. 1 of the Selective Training and Service Act of 1940 as evidence that the principle of equality requires that conscientious objectors

be subjected to the same compulsion as is accorded to those inductees who might otherwise offer to fight for their country and a just cause. (S. 10, 23) Congress recites that in a free society obligations and privileges should be shared generally in accordance with a fair and just system. By Sec. 5 certain exemptions were created which negative somewhat this so-called equality.

Congress, in this preamble emphasized the words "free society." In the Preamble to the Constitution of the United States, immediately following the words "promote the general welfare" are the words "and secure the blessings of liberty to ourselves and our posterity." It will also be noted that so experienced a constitutional lawyer as Cooley points out that the policy of this country is to avoid compulsion in matters of religious scruples and "even in the important matter of bearing arms for the public defense, those who cannot in conscience take part are excused. * * *" (G. 47). To enslave conscientious objectors is not to treat them equally with others within the meaning or purpose of the Act.

What we are urging is that the Director of Selective Service has departed from the principles of freedom and equality enunciated by Congress, and has given the conscientious objector a position in the Selective Service System below that of other persons subject to the Act, subjecting them to slavery without any authority from Congress. The Director, by his regulations, has extended the language of the Act of Congress "be assigned to work of national importance under civilian direction," to make it read in effect "be assigned to work of national importance under civilian direction *in concentration camps without compensation.*" This bold innovation on the Act of Congress commands attention, and should be promptly repudiated for what it is. It is bureaucratic interference with the free rights of citizens unnecessary to the power to wage war and raise armies. The Solicitor General (S. 10) begs the question before the court by stating:

> "Their assignment to work analogous to non-combatant service in the armed forces, but under civilian direction to avoid offending their own consciences, is clearly within the Congressional power. Congress has not, as petitioner contends (Pet. 30) annexed an unconstitutional condition to a privilege * * *."

The Director did the annexing.

He assumes what is to be proven. He merely negates where he should analyze. Obviously analysis would disclose the indicia of slavery pointed out by petitioner. (G. 28-9). So the Government finds it safer to negate than to analyze.

So, the Solicitor General chooses to meet the argument (G. 27, 31) and the decisions of this court, there cited, that an unconstitutional condition cannot be annexed to or imposed as the price of a privilege, by a bare statement of his contention without citation of authority.

This court said in *U. S. vs. Chicago M. St. P. & P. R. Co.*, 282 U. S. 311; 51 S. C. 159, 163:

> "It long has been settled in this Court that the rejection of an unconstitutional condition imposed by a state upon the grant of a privilege, even though the state possesses the unqualified power to withhold the grant altogether, does not annul the grant. The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant. There are many decisions to this effect; * * *."

This general principle applies with equal force to the United States.

Petitioner has been hustled by summary proceedings and rulings through trial and appeal and now is given a brush-off by the Solicitor General. Called to pass upon the liberty of this citizen and thousands of others similarly situated, he dismisses so important a right with mere negation and gloss: "Congress has not * * * annexed an unconstitutional condition to a privilege, but has provided for a draft of manpower for two different purposes: service in the armed forces, and work of national importance of a nonmilitary character?" (S. 11). In pleading, answering by conclusions of law without ultimate facts, would be dismissed as frivolous, avoiding the merits of the issue.

The Solicitor General, for reasons which are obvious to petitioner, has not answered the points, nor met the issue made in petitioner's brief: first, (G. 28, 29) that there are at least nine flagrant evidences of involuntary servitude, ranging from an order to labor without the consent of petitioner, to denial of compensation; and second, that such compulsory service is not within the constitutional provisions by which the Act of 1917 was justified, namely, power to raise armies. Does he fear that to dignify petitioner's position with serious treatment would concede

too much in petitioner's battle for constitutional freedom vs. total militarism in this once Christian nation. If the issues were fairly presented to the court, natural principles of justice might prevail and the Government's house of cards supported by force might fall.

The Solicitor General should be aware of the plot which seems to be brewing among bureaucrats in this country to draft labor for any and every purpose deemed expedient by bureaucracy under some vast delegation of authority from Congress. If such an outrageous program is attempted the wrath of a free people will destroy the bureaucratic house of cards and bring the enemies of free enterprise and free labor to just retribution as enemies of their country, as indeed they are.

This attempt to subject conscientious objectors to slavery is the entering wedge for the larger program which they have not yet dared to put into effect except upon a so-called voluntary basis. This court cannot remain unaware of danger to the fundamental security of our free people. Petitioner is here using plain language to bring the danger sharply in focus. The Courts, as ever, must be the final bulwark of constitutional liberties. Petitioner earnestly objects to any failure to take cognizance of the danger and refusal to protect his constitutional rights on the flimsy excuses offered by the Solicitor General.

It is not a question of usefulness, as the Solicitor General argues (S. 11). Petitioner declines to be drawn into questions of policy which are for legislative determination. Petitioner prays that the Solicitor General be required to address his brief to the issues of law which have been raised. One issue is whether the Director of Selective Service has departed from the language of the Selective Training and Service Act of 1940 by adding through his regulations to the language of the Act, quoted above, an extension of his personal power, interfering with the freedom of persons subject to the Act in a manner not required by or provided for therein. While it may be that military service requires the person subjecting himself thereto to leave his home and usual place of employment, it does not follow that a person accepting an assignment to work of national importance need leave his home town and present job.

Congressional grants of power in derogation of common right are to be strictly limited, and the words "be assigned

to work of national importance" do not imply that the Director of Selective Service shall originate or create work, but only that he may assign to work.

Since assignee is a free agent the Director cannot write into and add to the Act of Congress a power to compel the acceptance of the assignment if the assignee refuses to accept. The Act, as quoted by the Solicitor General (S. 23, 24) contains no power to force a free citizen to accept work under civilian direction. The Director may assign, but he cannot compel, and the Solicitor General has pointed out no language of the Act which confers the power of compulsion. Power of compulsion against natural and constitutional right cannot be implied. The cases supporting this principle of statutory construction are common.

PARSONS vs. BEDFORD, 28 U. S. (3 Pet.) 433, 448; 7 L. ed. 732, 737.

BLACK ON "INTERPRETATION OF LAWS," p. 300, sec. 115.

In petitioner's opinion, the Solicitor General untruly represents (S. 12, 16) that petitioner applied in Gov. Exhibit 2, being D. S. S. Forms 40 and 47, for the involuntary servitude to which it is proposed to subject him (S. 12). All D. S. S. Forms 40 are not uniform, and the one submitted to petitioner contained an unconscionable agreement which conscientious objectors were supposed to sign in order to obtain relief from participation in non-combatant service. The agreement, in form, required the signer to perform work of national importance under civilian direction assigned to him and to conform to all rules and directions made and given with reference thereto by the President of the United States, or by such person as he might designate or appoint for such purpose, pursuant to such rules and regulations as he might prescribe. Petitioner signed this provision in the questionnaire expressly limiting and conditioning it by adding, in his own hand, the words "unless it conflicts with my conscience." Petitioner, as an American citizen, has conscientious scruples against entering into involuntary servitude. The statement on page 7 of the questionnaire "In view of the facts set forth in this questionnaire it is my opinion that my classification should be IV" is not an application for such classification but merely the recitation of a fact. It is in no sense a waiver of constitutional rights. As stated by this Court in *U. S.*

vs. Chicago M. St. P. & P. R. Co., 282 U. S. 311, 51 S. C. 159, 163:

"The grantee may ignore or enjoin the enforcement of the condition without thereby losing the grant." Since the grant of exemption from military service to conscientious objectors is, as stated by Cooley, one of long standing constitutional policy in this country, the petitioner did not, by stating the fact that he is a conscientious objector, thereby agree to accept all the pains and penalties sought to be visited by the Director of Selective Service upon conscientious objectors as the price of the legislative and constitutional grant. The Solicitor General failed to meet the issue and begs the question when he argues *ad hominem* that petitioner "is not entitled to complain of its disadvantages (i.e. the disadvantages of slavery) in comparison with military service." (Parenthesis ours.) Retaliatory regulations providing internment of objectors, must be strictly construed (see 91 A. L. R. 795, 803).

The record is clear that the defendant duly raised the issue of the unconstitutionality of the order to report, as imposing involuntary servitude: (1) in the demurrer and motion to quash before the trial (R. 17, Par. 2); (2) in his plea in abatement (R. 23, Par. 3, 4, 5, 6, 7, 8 and 9); (3) in his plea in bar (R. 28, Par. 3 (d), (h) and (i); (4) in his request for instructions (R. 32, Par. 11-17); (5) in his assignment of errors.

The point was argued in the Appeal Court and the Court admitted the seriousness of the issue, but failed to set forth reasoning thereon in its opinion. The whole position of the Circuit Court of Appeals for the Seventh Circuit on the point principally argued in this motion for rehearing is fully stated in the following quotations from the *Gormly case*.

> (P. 228), "Reversal of judgment is sought because: * * * (3) Internment in a conscientious objector's camp constitutes involuntary servitude * * *, in violation of the Federal Constitution. * * *.
>
> (P. 229), "It is not necessary to discuss, at length, issues 1, 3, 4, 5, and 6. They have been sufficiently treated in the case of United States vs. Mroz, 136 F. 2d 221, decided by this Court, June 3, 1943. * * *
>
> (P. 230), "And he was worried also about the pay he was to receive while in the camp."

All that the Court said in *U. S. vs. Alois Stanley Mroz*, on June 3, 1943 having the slightest bearing is here quoted from the Court's opinion:

"(P. 223, 224): The oral argument of counsel at the hearing before this court was vehement in deriding the Selective Service Act and its administration. He contended, among other things, that military service constituted slavery and involuntary servitude in violation of the Thirteenth Amendment to the Constitution. To a greater degree, he argued, was the Selective Service Act violative of Amendment XIII and more clearly constituted involuntary servitude when applied to 'a minister' who had conscientious objections to war, yet was sent to a camp *without pay*. * * *

"(P. 224): On the merits of this appeal a mere listing of appellant's grounds for reversal suggests triviality of merits.

"(Footnote p. 225): The indictment is criticized because vague. It is said to be void because it is not alleged the work is of 'national importance,' nor does it allege his knowledge of the commission of any crime, nor does it allege that the work at the camp would be under 'civilian direction.' The indictment is also said to be void because based on an unlawful delegation of power by Congress to the President and the Director of Selective Service; the order to report was invalid because made arbitrarily and without due hearing and under an Act not providing due process; the proceedings before the appeal board lacked due process; the Selective Service Act is void; the act is in effect a bill of attainder or *ex post facto* law; assignment of defendant to Civilian Public Service Camp is in effect attainder of treason; the conviction was erroneous because based on unreasonable search and seizure and requirement of self-incrimination (i.e., answering the questionnaire). Obviously, much of this attack is not properly based on the alleged vagueness of the charge. Generally speaking the Supreme Court has fully answered the objections in cases that came before it during the last World War. *Arver v. U. S.* (Selective Draft Law Cases), 245 U. S. 366; *Goldman v. U. S.*, 245 U. S. 474; *Cox v. Wood*, 247 U. S. 3; *Ruthenberg v. U. S.*, 245 U. S. 480; *U. S. v. MacIntosh*, 283 U. S. 605; *U. S. v. Williams*, 302

U. S. 46; *Hamilton v. Regents*, 293 U. S. 245. The law is well settled by these decisions and the objections are rejected as frivolous."

The page references are to 136 F (2) No. 1 advance sheets.

From our reading of the opinions and of the footnote, we cannot find that the Circuit Court of Appeals made any reasoned judicial determination with respect to the important point which is discussed in this motion for rehearing. The appeal court, as well as the Solicitor General, seem to prefer to cashier petitioner's rights and the illegal order subjecting him to involuntary servitude, as trivial and frivolous. That is not the way in which charges of infraction of liberty have heretofore been considered by the courts of this land, and we appeal to this court to right the wrong which has been done to petitioner and hear the important question which has been raised, on its merits, along with the *Falbo* and *Billings cases* in which writs of certiorari were granted.

III. AMERICAN CIVIL LIBERTIES UNION BULLETIN

Counsel is in receipt of Bulletin No. 1099 of the Press Service of American Civil Liberties Union, 170 Fifth Avenue, New York, N. Y., for release Monday, October 25, 1943. The bulletin states:

HERSHEY URGED TO END CONTRACTS FOR C. O. CIVILIAN SERVICE

Urging that civilian public service should become more "significant in terms of usefulness to the country," the Union's National Committee on Conscientious Objectors has addressed a letter to Major General Lewis B. Hershey, Director of Selective Service, with three specific suggestions for changes. The present arrangement between Selective Service and the religious agencies now conducting work camps will expire on December 31. The Committee urged:

"1. That contractual relations between Selective Service and all agencies be discontinued and that the present camps conducted by religious agencies be treated as one group of places to which men may be assigned as at present, but without any control by Selective Service save the necessary inspection to determine that they are meeting whatever standards you fix.

"2. That instead of the present camp operations division in Selective Service a C. P. S. division be created, staffed by civilians, not military officers, with full charge over all forms of civilian public service.

"3. That this division assign all men classified IV-E either (1) to one of the camps under religious auspices, (2) to the government camp, (3) directly to the present detached services, (4) to the so-called guinea pig projects, or (5) to such other individual or group services as meet whatever standards you fix."

The Committee argued that "these comparatively simple changes" would obviate the following difficulties:

"1. They would remove all criticism that religious camps conducted by private agencies are virtually under control of Selective Service.

"2. They would remove all criticism that the direction of civilian public service is in the hands of military officers.

"3. They would solve the problem of pay, for agencies to which men are assigned would be free to pay nothing or anything up to whatever limit Selective Service might fix.

"4. They would tend to assign men in accordance with their occupational abilities, thus permitting them to render maximum service to the country instead of requiring them to do work for which many are not fitted.

"5. They would prevent the many unnecessary commitments to prison of IV-E men who now refuse service in work camps and who would doubtless be willing to undertake one of the other forms of service outside.

"6. They would result in withdrawing from the courts the several pending legal contests involving military direction and the retention of pay."

The Committee points out that Selective Service would still retain full control over the entire civilian public service program by withdrawing its approval from any camp or agency which does not meet its standards, and by withdrawing from it men assigned. The communication was signed by Ernest Angell, chairman.

Ernest Angell, whose name is shown as chairman, is a member of the Bar of the State of New York, and has his office in the City of New York. Petitioner in his pleas defended on the ground that the order was invalid because the place where he was ordered to report did not conform to the Congressional requirement of "work of national

importance under civilian direction." Evidence to support the defense was offered, denied admission and exception taken (T. 68-82). The bulletin quoted above supports the defenses pleaded.

In the same bulletin appears the following item:

UNION AIDS C. O. REFUSING TO WORK WITHOUT PAY

The A. C. L. U. is aiding in the defense of James Manoukian, indicted in Denver, Colorado, for refusal to work at the government camp for conscientious objectors at Mancos. Manoukian said he was willing to work if paid, but to accept work without pay is to "agree to a theory abhorrent to basic American principles." Test cases on the right of the government to exact compulsory labor without pay are being started by several other conscientious objectors, with the aid of the Union. Petitions for writs of habeas corpus to release the men from camps will be sought on the ground that regulations violate constitutional rights.

Manoukian, who pleaded not guilty before a Denver judge in September, is now in the Denver County jail. He is represented by Carle Whitehead, one of the Denver attorneys for the A. C. L. U.

These quotations from the Bulletin and Press Release of the American Civil Liberties Union are inserted at this point to show that the position of the petitioner before this Court is not a mere figment of the imagination and not a triviality as the Solicitor General attempts, in his brief, to lead the Court to believe. There are decisions of this Court to the effect that involuntary servitude does not necessarily depend upon whether the slave is paid wages or not, but the test is whether he engages in the servitude freely and willingly.

If this court declines to grant this petition, some petitioner whose sincerity is more convincing, or who comes to court at a time when the apple-cart already tipping can no longer be stayed, will be heard. A deaf ear will not satisfy the cries springing up over the land against this great national injustice. It would be more fitting to hear the questions raised by petitioner at this time when the Act in question will be under examination by the court in two other cases, raising similar issues.

IV. ARGUMENT OF ARTHUR J. EDWARDS ADOPTED

About the time that this court denied petitioner's request for writ of certiorari, his counsel received an unsolicited letter from Arthur J. Edwards of Montclair, N. J. This led to an exchange of letters and those from Mr. Edwards have been consolidated in logical sequence, introducing Mr. Edwards, but omitting some other portions deemed immaterial. Petitioner presents this argument and adopts it as his own to demonstrate to the court that he is not alone in his firm conviction that the Civilian Public Service Camps were not authorized by Congress and are extra-legal and so, illegal; that if his is a voice crying in the wilderness (Isaiah 40-3) it is as in Holy Writ, the voice of God, abhorring the smell of slavery, and will grow in volume as it swells across the land. The letter of Mr. Edwards, so consolidated, reads:

Perry J. Stearns, Esq.,
927 Wells Building,
Milwaukee 2, Wis.
Dear Mr. Stearns:

Re: Walter Ford Gormly v. United States

From very brief newspaper accounts I have become interested in the above case because it seems to be an authentic instance of a violation of constitutional rights in the administration of the Selective Service Act. I am neither a conscientious objector nor a pacifist, but have been interested since the introduction of the Burke-Wadsworth Bill in the correction of the great injustices perpetrated on conscientious objectors during World War I.

I know the law applicable to conscientious objectors from a rather intimate connection with its inception and application, but not much about procedure, and was one of the group which by testimony before the Military Affairs Committees in the summer of 1940 secured the introduction and adoption of the present provisions of the Selective Service Act which did not appear at all in the bill when introduced. I testified before Representative May's Committee on July 30, 1940, and my contribution appears on pp. 361-366 of the printed Hearings. I have been a student and commentator on constitutional law for many years, particularly the powers of Congress, and have such good authority as the late James M. Beck that I should regard

myself as a lawyer in the Websterian sense of "one who is versed in law." My military training came from a term at St. John's Military Academy, Delafield, Wisconsin, in 1894. I was a member in World War I of Secretary Baker's Board of Inquiry, detailed by him in an article in Columbia Law Review soon after the war.

I have maintained since the camps were started that for the conscientious objector who strenuously objected to such assignment to work as being opposed to his constitutional rights, the conditions of such assignment by his draft board amounted to consignment to "involuntary servitude" which was not "as a punishment for crime whereof the party shall have been duly convicted." To be possessed of a conscience which within one's person prohibits the doing of certain acts is not a crime, though it may not conform to the generally expected and demanded standard of conduct. In fact, Congress, by an act of grace, has made adequate definition and provision for such exceptional cases in Sec. 5 (g) of the Act.

That such work under such conditions of unwillingness is "involuntary" is beyond question. I have sought to determine whether "servitude" has some legal restrictions which make it mean something less than merely service required to work out an obligation, financial or duty, to some person, government or cause. As to the instant application there can be no doubts. I suggest the reading of *Butler v. Perry*, 240 U. S. 328, 333. Work in a Civilian Public Service camp, compulsory, involuntary, without compensation, and in fact under a further charge for subsistence, does not appear to be "one of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc.," or work upon the highway in lieu of tax payments for maintenance of roads, as in that case. See also 12 C. J. 937-938, under Constitutional Law. Also *Flannagan v. Jepson*, 177 Iowa 393, 158 N. W. 641, re want of power of Judge to imprison for contempt of court at hard labor without a jury trial.

Highway work, as in the *Butler case*, stems back to old English usage and law. The work had to be done for the preservation of community facilities and the State cared not whether the citizen did the work himself, hired a substitute, or paid taxes which enabled the community to hire it done. Work in conscientious objector camps is essentially different. It is a function which was not systematically

performed by anyone in pre-war days. It was not one of the duties individuals owe to the State. It is required of no one whatsoever except those ordered to camps by draft boards. It is not a system even visioned by Congress so far as my investigation of the hearings discloses. No one suggested to Congress that this was what their words meant. It was a system initiated by private enterprise—by the so-called historic peace churches, financed by them and such as voluntarily contributed to help them. It is awfully hard to comprehend the idea of something required of men that Congress never conceived of and to impose a five year sentence for violation of a mere regulation unsupported by constitution or law.

The following are excerpts from "A report on the Treatment of Conscientious Objectors in World War II —Conscience and the War," just published by the American Civil Liberties Union, page 22 (showing mandatory character of work required):

> "Selective Service's attitude was presented in a memorandum drawn up by Lieut.-Col. Franklin A. MacLean about a year ago at a training course for Civilian Public Service Camp directors. He says:
>
> > 'From the time an assignee reports to camp until he is finally released he is under control of the Director of Selective Service. He ceases to be a free agent and is accountable for all of his time, in camp and out, 24 hours a day. His movements, actions and conduct are subject to control and regulation. He ceases to have certain rights and is granted privileges instead. These privileges can be restricted or withheld without his approval or consent as punishment, during emergencies or as a matter of policy. He can be told when and how to work, what to wear, and where to sleep. He can be required to submit to medical examinations and treatment and to practice rules of health and sanitation. He may be moved from place to place and from job to job, even to foreign countries for the convenience of the government regardless of his personal feelings and desires.'"

The foregoing is also quoted in "The Conscientious Objector under the Selective Training and Service Act of 1940" published by the National Service Board for Re-

ligious Objectors, Aug. 1, 1943, the official agency of the United States. (Reg. 653 and 691.) This quotation from the Memorandum of Lt. Col. MacLean interprets briefly the rather extended regulations appearing at pages 16-22 of your brief in which the compulsive parts may escape the reviewing judges.

For a man who does not want such an assignment, it would be difficult to define "involuntary servitude" in clearer or more specific terms.

Page 10—

> "This arrangement (the Civilian Public Service Camps) was proposed to the government just after the draft act was passed, based on the desire of the 'historic peace churches' to take care of their own men."

Page 11—

> "* * * civilian work is on the whole less satisfac- factory than the farm labor and reconstruction work of the first World War, and men are not permitted as then to receive a soldier's pay."

Creation of a national personal servitude by Congress or by an administrative body authorized by Congress, must, if at all possible, be by specific enactment carrying into execution one of the designated powers of the Constitution. Such servitude, particularly when required of one who does not voluntarily submit to it, cannot be assumed to be authorized merely by inference from such general language as "shall, if he be conscientiously opposed * * * in lieu of such induction be assigned to work of national importance under civilian direction." This is particularly unwarranted where no constitutional power supports the right of an administrative body to make such requirements, and where the meaning of the words is given a strikingly different interpretation in English practice, from whose laws the Congress adapted the words and incorporated them into the Selective Service Act.

I was discussing this general proposition with one of our local draft board members, who, I have assumed, was not particularly sympathetic to the conscientious objector position, and he said that he thought the Civilian Public Service camp system as administered, partook too much of the nature of prison camps, assignment thereto in the nature of punishment for a type of mind or personality. In this view the word "assign" takes on too much the

realistic meaning of "sentence" for those who are not amenable to the assignment.

The Act of Congress enforcing the XIIIth Amendment may not cover this situation. I refer to U. S. C. Title 8, Sec. 56 and U. S. C. Title 18, Sec. 444, without opportunity to extend the search. As against an action of the United States itself, I think a failure of enforcement act to cover the situation would not be material.

Then the provision of the Selective Service Act: "in lieu of such induction, be assigned to work of national importance under civilian direction * * *," needs careful analysis. These words were adapted from the English law, the Military Training Act of May 26, 1939, which according to the debate in Parliament on May 11, 1939, then read, with respect to men classified as conscientious objectors:

> "shall be conditionally registered * * * the condition being that he must engage in, and perform, some *work* designated in the order as being, in the opinion of the tribunal, *of national importance.*"

This Act was superseded on September 3, 1939 by the National Service (Armed Forces) Act in which this work phrase was changed to work "of a civil character and under civilian control," without, I believe, any intention of changing the essential meaning. I know for a fact the exact circumstances of the transplanting of these words of the May and September 1939 Acts into the Selective Service Bill. In England, this means an inquiry by the draft board as to what a man is doing, and if his status as a conscientious objector is established, then merely in the exertion of the Board's power to see that the man is engaged in his old job which is of "civil importance," or making him transfer to a new job, not contributing directly to the war effort, but useful to the community in its more ordinary functions. In one case I read the man's answer was that he was driving a "milk lorry." They told him to continue such driving occupation. Failure to allow an American to continue in the community at work at any occupation of national importance, when he has one, has seemed to me the great distortion in the administration of Sec. 5 (g).

Definition of "work of national importance" is difficult for the reason that I do not believe it appears previously in any United States law, at least none that have come to my attention.

Then I feel that embodied in the phrase "in lieu," there must be some equality in the substitution, and that if it is employment and work considered by the United States as of national importance there must be included an equitable element of monetary compensation as well. Instead of which the Selective Service has construed this to mean work without compensation, and, most extraordinary of all, a payment to the government for sustenance.

An appropriate answer to the opinion of the Circuit Court of Appeals, quoted at page 48 of your brief to the effect that the appellant "seemingly fails to realize that war is realistic," is found in an editorial in "Life" for October 4, 1943, quoting General George C. Marshall, and saying (p. 34):

> "The United States, the General (Marshall) pointed out, is a democracy in which citizens have certain rights. And whatever happens we must stand for these rights and never countenance their destruction."

The opinion misses the entire argument that rights have been granted this man by Congress whatever the court's opinion as to wisdom of Congressional action. Yours is merely a proceeding to prevent destruction of those rights by an administrative failure to properly understand the language of the act and interpret the novel clauses in the light of England's law from which it was incorporated.

The settled principle enunciated in *Frost vs. Railroad Commission*, 271 U. S. 583, 594, 8, 46 S. C. 605, 607, 609 (cited p. 30 of your brief) is there stated with force.

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights. If the state may compel the sur-

render of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

What is there said at 271 U. S. 598, 46 S. C. 609 may best be paraphrased, to apply it specifically to *Mr. Gormly's case*, as follows:

". . . and the principle that a state (and likewise the United States) is without power to impose an unconstitutional requirement (involuntary servitude in a C. P. S. camp) as a condition for granting a privilege (assignment to work of national importance in lieu of induction) is broader than the application thus far made of it." (applications suggested in parentheses are supplied.)

As to the opinion in the *Mroz case* I am particularly shocked at the last full paragraph at p. 24 and its complete failure to realize the psychology of the C. O. And it's a peculiar psychology which it is difficult for the rest of us to realize or even sympathize with—we can just scientifically recognize its existence and, legally, the fact that Congress has also done so and made a certain type of provision for it. The essential difference between the 1917 and the 1940 selective service laws is that the first recognizes, with respect to the administration of the raising of an army, only the military department of the government. This was the background of the Arver vs. U. S. decision and the then duty of the citizen to be inducted into the army and then make his plea for special treatment in case his conscientious objection was upheld upon examination by army officers. That situation was completely changed in 1940.

Conscientious objection is not an act or conclusion of the intellect. Rather it is a reaction of the whole personality which just will not let a person do something which the conscience forbids. It is strictly comparable to the reaction of most normal persons who will not commit the more heinous crimes named in the Ten Commandments, not because of their authority, not because of fear of punishment, not because of some intellectual conclusion that they are wrong, but just because their's is a personality that does not and will not do such acts.

I got some insight into "involuntary servitude" in acting on a Committee which induced our New Jersey Governor not to honor an extradition order which would have returned a South Carolina sharecropper to what we insisted was a state of peonage or involuntary servitude. One of the latest of the peonage cases is *Taylor vs. Georgia*, 62 S. Ct. 415 (1942), from which

> "The necessary consequence is that one who has received an advance on a contract for services which he is unable to repay is bound by the threat of legal sanction to remain at his employment until the debt is discharged. Such coerced labor is peonage."

Peonage is merely a subdivision of "involuntary servitude" where the condition is the working out of a debt. The "in terrorem" effect may be supplied by the local law, just as in this case it is the misconstruction of the Selective Service Act which inspires the local Draft Board to send a man to involuntary servitude.

This is only a sketch of what I have long wanted to see argued out before the Supreme Court in a case where conditions would justify.

Very truly yours,

Arthur J. Edwards.

Just as the strict position taken by the Court in *Minersville School District vs. Gobitis*, 310 U. S. 586, 60 S. C. 1010, was reversed by *West Virginia State Board of Education vs. Barnette*, Supreme Court Reporter advance sheets, July 1, 1943, 63 S. C. 1178, so there is hope that the decision of this Court in *U. S. vs. MacIntosh*, 283 U. S. 605; 75 L. Ed. 1302, may be reversed. We call attention particularly to the dissenting opinion of Chief Justice Hughes in which Justices Holmes, Brandeis and Stone concurred. The Chief Justice there said, 75 L. Ed. 1312 seq.:

> "I think that the requirement should not be implied, because such a construction is directly opposed to the spirit of our institutions and to the historic practice of the Congress. It must be conceded that departmental zeal may not be permitted to outrun the authority conferred by statute. If such a promise (to bear arms) is to be demanded, contrary to principles which have been respected as fundamental, the Congress should exact it in unequivocal terms, and we should not, by judicial decision, attempt to perform

what, as I see it, is a legislative function." (Parentheses ours) * * *

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"But the long-established practice of excusing from military service those whose religious convictions oppose it confirms the view that the Congress in the terms of the oath did not intend to require a promise to give such service. The policy of granting exemptions in such cases has been followed from colonial times and is abundantly shown by the provisions of colonial and state statutes, of state constitutions, and of acts of Congress. * * *

"The importance of giving immunity to those having conscientious scruples against bearing arms has been emphasized in debates in Congress repeatedly from the very beginning of our government, and religious scruples have been recognized in draft acts. * * *

P. 1315

"The Congress has sought to avoid such conflicts in this country by respecting our happy tradition."

Petitioner believes that upon taking jurisdiction and considering this case on its merits the Court would find, like the minority in the case last quoted, that administrative zeal has outrun the act of Congress; that the involuntary servitude inherent in the invalid order for failure to obey which petitioner was sentenced below, is not within the terms of the Act of Congress, and to imply such power in the Director of Selective Service, i. e. to impute to Congress an intention to depart from American traditions and express prohibitions in the Constitution.

Mr. Edwards, in one letter, cites *State ex rel. Burnes National Bank vs. Duncan*, 265 U. S. 17; 44 S. C. 427, 428, in which this Court said:

"The states cannot use their most characteristic powers to reach unconstitutional results * * *. There is nothing over which a state has more exclusive authority than the jurisdiction of its courts, but it cannot escape its constitutional obligations by the device of denying jurisdiction to courts otherwise competent."

The same applies to the United States. It is a characteristic power to raise armies, but the exercise of such power cannot be availed of to violate plain prohibitions

of the Constitution, the panoply under which petitioner appears before this Court. Since the legislature cannot deny jurisdiction to the courts, so the courts should not surrender their jurisdiction to administrative boards.

CONCLUSION

The traveling salesman with a bill of goods usually has some letters of recommendation, and I print here a letter dated October 26, 1943, just received from Claude F. Cooper, Esq., Blytheville, Arkansas, acknowledging receipt of briefs in support of petitions for writ of certiorari in the *Gormly and Mroz* cases which he had requested. He says:

> "I am very much interested in these cases as I have some along the same lines and I feel sure that your briefs will be a wonderful help to me.
>
> "I think your petition should have been granted; but, of course, we can't always get everything we want. I have read your petition and brief and I do not see how or why it should have been denied. I think the matters are all well presented and I know your brief will be a great help to me in many ways."

On the other hand, in the same mail, I am in receipt of a postcard postmarked Sandstone, Minnesota, October 27, 1943, reading as follows:

> "As you see I have been assigned to Sandstone. Yours very truly, Walter F. Gormly."

In "The Atlantic Monthly" for October, 1943, Vol. 172, p. 57, one M. S. Hedges has an article entitled "The Search for the Democratic Man." The writer seems to be in some turmoil between a desire for perfection of the individual and a belief that a better world may be created by compulsion. He says, p. 59:

> "The state must constantly strive to divest itself of its own power. * * *

P. 61:

> "Human institutions created for freedom appear to have a way of enslaving the men for whom they were created. * * *
>
> "Man's willingness to enslave and to exploit his fellows tethers man to a slave order."

While the article is somewhat confused, it brings

sharply to mind the important function of this Court in preserving the institutions of individual freedom for which our fathers fought and for which our sons are now fighting, all under the aegis of the Bill of Rights.

In a tribute by Henry Seidel Canby to Wilbur L. Cross, author of "Connecticut Yankee, an autobigraphy," he says, "Of all Connecticut men in my time, Governor Cross is the outstanding example, the type and prototype of what is best in Connecticut. * * * He has its calculated obstinancy in a good cause, and its unexpected blaze of courageous anger when the time comes to champion the tough and unpopular and misunderstood issue, and make it win." The Connecticut type is the American type. The same blood that settled New England settled Virginia. The Yankees who joined with the Virginians to establish freedom as the keystone of American government in the Declaration of Independence and Constitution of 1787 as amended, still keep that spark alive in a totalitarian world. It burns on the altars of American freedom, on the hearths of American homes and in the hearts of free men everywhere. As Pallas was the goddess of wisdom, so wisdom has made a written constitution the palladium of our liberties and the Supreme Court the bulwark of that Constitution against anticipated executive and legislative attacks. The American people resent the attacks which have been made on the courts; and on the Constitution as an outmoded instrument. No bogey of national unity or economic security can long defeat the fundamental mainspring of individual freedom under our Constitution. Witness West Virginia State Board of Education vs. Barnette, 319 U. S. ..., 63 S. C. 1178 overruling Minersville School District vs. Gobitis, 310 U. S. 586, 60 S. C. 1010.

Woe to that combined office of Director of Selective Service and Chairman of War Manpower Commission. Woe to those in authority whether as administrators or advocates who contribute to the enslavement of a single American citizen in the name of freedom and equality.

Woe unto them that call evil good, and good evil. (Isaiah 5:20)

Woe to them that devise iniquity! (Micah 2:1)

Woe unto the world because of offences! For it must needs be that offences come; but woe to that man by whom the offence cometh! (Matthew 18:7)

Woe unto that man by whom the Son of Man is betrayed! (Matthew 26:24)

Woe unto that man who has the responsibility of safeguarding individual freedom under the Constitution from conspiracies in high places, and is derelict in that duty. May the wrath of Heaven reward him according to his merits.

The Connecticut Yankee has enpeopled the land. See "Migrations from Connecticut" by Mrs. Lois Kimball Mathews Rosenberry of Madison, Wis., being pamphlets XXVIII and LIV of the Tercentenary Commission of the State of Connecticut, Yale University Press, New Haven, Conn., 1936. His "calculated obstinacy in a good cause" is due for another "unexpected blaze of courageous anger."

Since freedom is so dependent on the written word, we pray that what we have here written in all respect to court and counsel, may influence the court to review the order denying petitioner's prayer for writ of certiorari and to grant the prayer. Thus only may a serious infraction of the Act of Congress be corrected without delay and thus only may justice be done to thousands of young men suffering martyrdom under foreign concepts. Such concept is that he who does not concede the total power of the state is an enemy of the state and cannot safely be at large. Totalitarianism is not Americanism. Congress by its Act does not class the conscientious objector as an enemy. The Director of Selective Service by an invalid order beyond the authority given by Congress has sought to isolate petitioner as an enemy along with other objectors. That such order was illegal and invalid is a complete defense to the indictment. The order denying the writ should be reversed.

Respectfully submitted,

PERRY J. STEARNS,
Attorney for Petitioner.